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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-47

DONALD T. EMERY,

Petitioner,

v.

STATE OF OHIO,

Respondent.

BRIEF IN OPPOSITION TO A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO

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QUESTION PRESENTED FOR REVIEW

Where, a defendant alleges entrapment in defense of a drug charge, does a charge to the jury explaining entrapment elements of the offense to reasonable doubt violate defendant's due process rights under the 14th Amendment.

STATEMENT OF THE CASE

On or about the month of April, 1977, the Medway Drug Enforcement Agency which is operated in Wayne and Medina Counties for the purpose of detecting drug traffic,

placed an agent, one David, aka Bruce, Smith, in Apple Creek State Institute to investigate alleged drug activities occurring either at Apple Creek State Institute or by persons employed there. (Trial Transcript 47, Q.76)

Agent Smith was hired at Apple Creek State Institute as a regular employee. In the course of his contact with others, he would make inquiry into the possibility of obtaining drugs. On one such occassion, the agent was given the defendant's name by one Tom Brothers who had dealth drugs in the past to the agent.

As a result of the lead, the agent phoned the defendant whom he had never seen or met and inquired of drugs. This began on September 19th or thereafter. Several calls were made until October 8, 1977, and the first sale occurred. The number of calls was disputed but the agent claims only five.

The defendant made a trip to see if drugs could be obtained from an acquaintance of his. He was told that same could be obtained and to check back which the defendant did. The second transaction on October 21, 1977, followed the same fact pattern, but with fewer phone calls.

In the first charge, the substance was found to be cocaine, while the second charge dealt with marijuana resin in liquid concentrate form.

The defendant admitted at trial the sales and that the same were done knowingly and illegally, but claimed all were done to get the agent "off his back". The defendant was not threatened by the agent at any time nor enticed by the agent to sell drugs, although the solicitation came from the agent.

The trial lasted three days and after due deliberation, the jury found the defendant guilty on both counts upon which verdict the Court entered judgment accordingly.

REASONS FOR NOT GRANTING WRIT

The matters of shifting burdens of proof to a defendant in a criminal case and the lessening of the burden upon the prosecution in a criminal case has been decided by the United States Supreme Court previously.

The petitioner seeks review based upon a charge to a jury in a criminal case respecting entrapment due to a portion of the charge which he claims shifts the burden upon the defendant to prove entrapment as well as lessening the State's burden of proof to something less than reasonable doubt. It is clear from reading the charge which is appended hereto that no such situation resulted nor was intended.[1]

Indeed, an argument may be made that the culpable mental state under the instant offense in such that a charge on entrapment should not have been given to the jury.[2]

The Ohio Supreme Court has determined that the State does not bear the burden of disproving an affirmative defense.[3] At the conclusion of the charge on entrapment, the Court states:

> "If, after considering all the evidence, including that on the subject of entrapment, you are not convinced beyond a reasonable doubt of the defendant's guilt, you must return a verdict of not guilty."

The significance is that assuming arguendo that the defendant was entitled to an instruction on entrapment, no obligation was placed upon him to prove entrapment which defendant would consider an affirmative defense. See *State v. Robinson*, 47 Ohio State 2d 103. In Ohio, there is a

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[1]Trial Transcript pages 310-312 (hereinafter referred to as T.T. 310-312).

[2]Ohio Revised Code (O.R.C.), §2901.22(B).

[3]*State v. Abner*, 55 Ohio State 2d 251 (1978).

question as to whether or not entrapment is an affirmative defense. See *State v. Dutton Drugs,* 3 O App. 2d 118 (1965) and *State v. Good,* 11 O App. 2d 459.

Additionally, the entrapment defense goes to the culpable mental state of purpose. The charge in this case under Ohio Revised Code §2925.03 requires only that the act be done knowingly which is defined in Ohio Revised Code §2901.22(B) as follows:

> "A person acts knowingly, *regardless of his purpose,* when he is aware that his conduct will probably cause a certain result or will probably be a certain nature. . . (emphasis added)."

The Court charged on purpose with respect to entrapment. Purpose is defined in §2901.22(A) as follows:

> "A person acts purposely when it is his specific intention to cause a certain result . . ."

By definition, therefore, no specific intent is required to be proven under a charge of trafficking. Thusly, it is difficult to see where the defendant was prejudiced by this charge.

The term "predisposition" is used. A rather clear illustration of evidence of "predisposition" as it relates to entrapment was given by Judge Leonard Hand in *United States v. Becker,* 62 R 2d 1007 (2d Cir 1933), wherein he cited three instances demonstrating predisposition to commit a criminal act which are: 1) when defendant has already engaged in similar criminal conduct; 2) where defendant has already formed a design to commit the crime or similar crimes; and 3) where defendant was willing to commit the act as evidenced by ready compliance. It should be noted here that the State objected to the Court's charge on entrapment (T.T. 263).

Finally, the prevailing law in this jurisdiction is that

entrapment is a jury question. The leading United States Supreme Court cases, *Sherman v. United States,* 356 U.S. 369 (1958); *Sorrels v. United States,* 287 U.S. 434 (1932); and *United States v. Russell,* 411 U.S. 423 (1973), stand for the proposition that the test of entrapment is subjective as to origin of intent and predisposition. The "origin of intent" was applied in *State v. McDonald,* 32 O. App. 2d 231 (Ninth District-1972). The Court of Appeals for Meigs County upheld a conviction for narcotics selling even though defendant claimed he was induced to make the sale. *State v. Dutton Drugs,* 3 O. App. 2d 118, 32 O. Ops 2d 204.

In the instant case, the fact pattern, the nature of the relationship of the defendant and agent, and defendant's activities in getting the drugs supply sufficient evidence for the matter to go to the jury. (See T.T. 238, Q. 36 and 37; T.T. 244 and 245, Q. 85 and 86, T.T. 247, Q. 98, 99, 100, 248, 249 and 250.)

The defendant seeks to accord "entrapment: constitutional status. In *United States v. Russell,* 411, U.S. 423 (1973), the Court noted that entrapment is not of constitutional dimension. The rationale for enforcement undercover activity has been stated a number of times. In *Sorrels v. United States,* 287 U.S. 434 (1932), the Court approved "artifice and stratagem" to be employed by law enforcement. It was stated in *State v. Good,* 11 O. Ops. 2d 459, at page 468 as follows:

> ". . . Where only the opportunity to commit a criminal act is afforded the defendant by the conduct of the informer, and the tendencies of the defendant indicate clearly that he intends to disregard injury to the public good and voluntarily accepts the opportunity afforded him to violate the law, particularly where the crime committed is one usually committed in secret and is of

> such a depraved character that the public must be protected, he should, under such facts, stand the consequences of his act. Law enforcement agencies should be allowed to defend society against crimes committed in secret with tools that are equal to the task and through channels that (limited, of course, by the defendant's constitutional rights) will stamp out such destructive conduct which cannot otherwise be properly controlled. The safety of the public is the primary consideration of law enforcement."

See also, *State v. Rowan*, 32 O. App. 2d 142, 61 O. Op. 2d 165; *State v. McDonald*, 32 O. App. 2d 231; *State v. Hsie*, 36 O. App. 2d 99.

In this case, the testimony revealed that Smith (the agent) was given the defendant's name by another person dealing in drugs. Smith merely made phone calls (number of which is disputed) and followed through to finalize the transaction. There is nothing about the agent's behavior which is violative of the defendant's constitutional rights.

CONCLUSION

The precepts set forth in cases advanced by petitioner have not been violated. It is clear that the defendant, in a criminal case, has no burden of proof. Conversely, the State has no burden to disprove specifically the defense advanced by the defendant.

Since this Court has passed upon this matter previously, the writ should be denied.

Respectfully submitted,

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APPENDIX

Ohio Revised Code Section 2901.05

§2901.05 Burden and degree of proof.

(A) Every person accused of an offense is presumed innocent until proven guilty beyond a reasonable doubt, and the burden of proof is upon the prosecution. The burden of going forward with the evidence of an affirmative defense is upon the accused.

(B) As part of its charge to the jury in a criminal case, the court shall read the definitions of "reasonable doubt" and "proof beyond a reasonable doubt," contained in division (D) of this section.

(C) As used in this section, an "affirmative defense" is either of the following:

(1) A defense expressly designated as affirmative;

(2) A defense involving an excuse or justification peculiarly within the knowledge of the accused, on which he can fairly be required to adduce supporting evidence.

(D) "Reasonable doubt" is present when the jurors, after they have carefully considered and compared all the evidence, cannot say they are firmly convinced of the truth of the charge. It is a doubt based on reason and common sense. Reasonable doubt is not mere possible doubt, because everything relating to human affairs or depending on moral evidence is open to some possible or imaginary doubt. "Proof beyond a reasonable doubt" is proof of such character that an ordinary person would be willing to rely and act upon it in the most important of his own affairs.

Charge to Jury by Court

THE COURT: Ladies and gentlemen of the jury, you have heard the evidence and the arguments of counsel. It is now the duty of the Court at this time to instruct you in the law that applies to the case.

As you have been told, the Court and jury have separate functions. You decide the disputed facts and the Court provides the instructions of the law. It is your sworn duty to accept these instructions and to apply the law as it is given to you by the Court. You are not permitted to change the law or apply your own conception of what you think the law is or should be.

The criminal case begins with the filing of an indictment. The indictment informs the defendant that he has been charged with a crime. The fact that it has been filed may not be considered by you for any purpose. The plea of Not Guilty is a denial of the charge and puts in issue the essential elements of the crime.

The defendant is presumed innocent until his guilt is established beyond a reasonable doubt. The defendant must be acquitted unless the State produces evidence that convinces you beyond a reasonable doubt of every essential element of the crime charged in the indictment.

Reasonable doubt is present, when, after you have carefully considered and compared all the evidence, you cannot say you are firmly convinced of the truth of the charge. Reasonable doubt is doubt based on reason and common sense. This reasonable doubt is not a mere possible doubt because everything connected with human affairs or depending upon moral evidence is open to some possible or imaginary doubt. Proof beyond a reasonable doubt is proof of such character that an ordinary person would be willing to

apply it and act upon it in the most important of his own affairs.

If, after full and impartial consideration of all the evidence, you are firmly convinced of the truth of the charge, the State has proved its case beyond a reasonable doubt. If you are not firmly convinced of the truth of the charge, you must find the defendant Not Guilty.

Now what is evidence? Evidence is all of the testimony received from the witnesses and the exhibits. Evidence may be direct or circumstantial or a combination of both.

Direct evidence is testimony given by a witness that has seen or heard the facts to which he testifies. It includes exhibits and those things admitted in the case.

Evidence also may be used to present a fact by inference. This is referred to as "Circumstantial evidence." Circumstantial evidence is the proof of a fact by direct evidence from which you may infer other reasonable facts and conclusions.

In the absence of direct evidence, circumstantial evidence by itself will justify a finding of guilty in the circumstances, if the circumstances are entirely consistent with the defendant's guilt or wholly inconsistent with any reasonable theory of the defendant's innocence and are so convincing as to exclude a reasonable doubt of the defendant's guilt.

Where the evidence is both direct and circumstantial, the combination of the two must satisfy you of the defendant's guilt beyond a reasonable doubt.

The evidence, as I have said does not include the indictment, answers that you were instructed to disregard, opening and closing statements and arguments of counsel. There are designed to assist you, but they are not evidence.

You must not speculate as to why the Court sustained an objection to any question or what the answer to such question might have been. You must not draw any inference or

speculate on the truth of any suggestion included in the question that was not answered. Statements or answers that were strickened by the Court or which you were instructed to disregard are not evidence and must be treated by you as though you never heard them.

You, the jury, are the sole judges of the fact, the credibility of the witnesses, the weight of the testimony and the weight of the evidence. To weigh the evidence you must consider the credibility of each person testifying. You will apply the tests of truthfulness which you apply in your daily lives. These tests include appearance of each witness on the stand; the manner of testifying; the reasonableness of his testimony; the opportunity which he had to see and hear or know the things about which he testified; the accuracy of his memory; frankness or lack of intelligence; interest or bias; together with all the facts and circumstances surrounding his testimony. Applying these tests, you will assign to the testimony of each witness such weight as you deem proper.

You are not required to believe the testimony of any witness simply because the witness was under oath. You may believe or disbelieve all or any part of the testimony of the witness. It is your province to determine what testimony is worthy of belief and what testimony is not worthy of belief.

There are two cases involved in this trial. In case No. 77-CR-131, the defendant is charged with Aggravated Trafficking in Marijuana. Before you can find the defendant guilty, you must find beyond a reasonable doubt that:

> On or about the 8th day of October, 1977, and in Wayne County Ohio, the defendant knowingly sold marijuana resin preparation and that the marijuana resin preparation was in a liquid concentrate, liquid extract or liquid distillate form, a controlled substance.

Now in Case No. 77-CR-157, the defendant is charged

with Trafficking in Drugs. Before you can find the defendant guilty, you must find beyond a reasonable doubt that:

> On or about the 21st day of October, 1977, and in Wayne County, Ohio, the defendant knowingly sold or offered to sell cocaine, a controlled substance, in an amount less than the minimum bulk amount.

Bulk amount as it applies to this case, 77-CR-157, is an amount equal to or exceeding ten grams.

There are certain definitions which the Court will give you which you will apply in your deliberations.

Knowingly, Knowingly. A person acts knowingly, regardless of his purpose, when he is aware that his conduct will probably cause a certain result or he is aware that his conduct will probably be of a certain nature. A person has knowledge of circumstances when he is aware that such circumstances probably exist. Knowingly means that a person is aware of the existence of facts that his acts will probably cause a certain result or be of a certain nature. Since you cannot look into the mind of another, knowledge is determined from all the facts and circumstances in evidence.

Sale. Sale includes delivery, barter, exchange, transfer or gift or offer thereof, and each transaction made by any person whether as principal, proprietor, agent, servant or employee.

Offer. Offer means to present for acceptance or rejection.

Marijuana means all parts of any plant of the genus cannabis whether growing or not, the seeds thereof, the resin extracted from any part of the plant, and every compound, manufacture, salt, derivative, mixture, or preparation of the plant, its seeds or resin. It does not include the mature stalks of the plant, fiber produced from the stalks, oils or cake made from the seeds of the plant, any other compound, manu-

facture, salt, derivative, mixture or preparation of the mature stalks, except the resin extracted therefrom, fiber, oil or cake, or the sterlized seed of the plant which is incapable of germination.

Bulk Amount. Section 2925.01 (E) (3) fixed the bulk amount as it applies to Case No. 77-CR-131 as an amount equal to or exceeding two grams of resin in a liquid concentrate, liquid extract, or liquid distillate form.

Controlled Substance. A controlled substance means a drug, compound, mixture, preparation or substance included in Schedule I, II, III, IV or V of Section 3719.41, Ohio Revised Code; and the Court charges you that marijuana resin preparation is included in Schedule I of Section 3719.41, Ohio Revised Code.

The Court further charges you that Cocaine is a controlled substance.

Generally a witness may not express an opinion. However, one who follows a profession or special line of work may express his opinion because of his education, knowledge and experience. Such testimony is admitted for whatever assistance it may provide to help you to arrive at a just verdict.

Questions have been asked in which an expert witness was permitted to assume that certain facts were true and to give an opinion based upon such assumption. You must determine whether the assumed facts, upon which the expert based his opinion, are true. If any assumed fact was not established, you will determine its effect upon the opinion of the expert. As with other witnesses, upon you alone rests the duty of deciding what weight should be given to the testimony of the expert. In determining its weight, you may take into consideration his skill, experience, knowledge, veracity, familiarity with the facts of this case, and the usual rules or

testing credibility and determining the weight to be given to the testimony.

The testimony of the defendant is to be weighed by the same rules that apply to other witnesses.

Now a number of exhibits and testimony relating to them have been introduced. You may consider whether the objects are the same objects and in the same condition as originally taken by the officer. You will determine what weight, if any, the exhibits should receive in light of all the evidence.

The defendant denies that he formed a purpose to commit a crime. He claims that he is excused because he was unlawfully entrapped by the undercover agent.

Unlawful entrapment occurs when a police officer or agent plants in the mind of the defendant the original idea and purpose, inducing the defendant to commit a crime that he had not considered, and which otherwise he had no intention of committing, or would not have committed but for the inducement of the undercover agent.

If the defendant did not himself conceive the idea of committing a crime, and it was suggested to him by the officer for the purpose of causing his arrest, the defendant must be found Not Guilty. However, if the defendant commits a crime while acting, even in part, in carrying out his own purpose or plan to violate the law, an entrapment is not unlawful and is not a defense, even if the officer suggested the crime and provided the opportunity or facilities or added or encouraged its commission.

A person is not entrapped when officers, for the purpose of detecting crime, merely present a defendant with the opportunity to commit an offense. Under such circumstances, craft and pretense may be used by law officers to accomplish such a purpose.

If you find by credible evidence that the defendant had the

predisposition and criminal design to commit the acts into which he claims he was entrapped, and that he was merely provided with an opportunity to commit those acts for which he was both apt and willing, then he has not been unlawfully entrapped. The claim of unlawful entrapment is a denial of general criminal purpose as a result of special facts or circumstances.

If, after considering all the evidence, including that on the subject of entrapment, you are not convinced beyond a reasonable doubt of the defendant's guilt, you must return a verdict of Not Guilty.

Purpose is a decision of the mind to do an act with a conscious objective of producing a specific result or engaging in specific conduct. To do an act purposely is to do it intentionally and not accidentally. Purpose and intent mean the same thing. The purpose with which a person does an act is known only to himself unless he expresses it to others or indicates it by his conduct.

Now I have outlined the essential elements of the criminal charges in both cases. If you find that the State has proved beyond a reasonable doubt all of the essential elements of any one or more of the crimes charged in the separate counts in the indictments, your verdict must be Guilty as to such crime or crimes according to your findings.

If you find that the State failed to prove beyond a reasonable doubt any one of the essential elements of any one or more of the crimes charged in the separate cases, your verdict must be Not Guilty as to such crime or crimes, according to your findings.

Consider the cases separately. The charges set forth in each case in the indictments constitute a separate and distinct matter. You must consider each case and the evidence applicable to each case separately and you must

state your findings as to each case uninfluenced by your verdict as to any other case. The defendant may be found Guilty or Not Guilty of any one or all of the crimes charged.

You will have with you in your jury room the two forms of verdict, one for each case. In Case No. 77-CR-131, the verdict form in this case reads:

"We, the jury, find the defendant, Donald T. Emery," then there is a blank to fill in "Guilty" or "Not Guilty."

If your verdict is Guilty in Case No. 77-CR-131, you will separately find the amount of marijuana resin preparation sold. However, you need not find and return a verdict on the exact amount. It is sufficient if you find that the amount is less than the bulk amount, bulk amount, or equal to or exceeding three times the bulk amount.

If your verdict is Not Guilty in Case No. 77-CR-131, you need not find and determine the amount sold. The verdict form provides, in the event you find him Guilty,

"and we do find the amount of marijuana resin preparation sold to be," and you will fill in as I have said,

"less than bulk amount,

"bulk amount," or

"equal to or exceeding three times the bulk amount."

In Case No. 77-CR-157, the verdict form in this case reads:

"We, the jury, find the defendant, Donald T. Emery," then there is a blank to fill in "Guilty" or "Not Guilty" according to your findings. In Case No. 77-CR-157, you need not concern yourselves with the amount sold.

Now you have no right to consider or discuss the subject of punishment. Your duty is confined to determining the guilt or innocence of the defendant. The duty to determine the punishment is placed by law upon the Court.

You must not be influenced by any consideration of

sympathy or prejudice; but it is your duty to carefully weigh the evidence and decide the disputed questions of fact and apply the instructions of the Court and render your verdict accordingly. In fulfilling your duty, your efforts must be to arrive at a fair and just verdict. Consider all the evidence and make your finding with intelligence and impartiality, without bias or sympathy or prejudice so that the State of Ohio and the defendant will feel that their case was fairly and impartially tried.

If, during the course of the trial, the Court said or did anything which you consider an indication of the Court's view of the facts, you are instructed to disregard it for none was intended.

Your first duty upon entering the jury room is to select a foreman or forelady to preside over your deliberations. The foreman or forelady will see that your deliberations are orderly and that each juror has the opportunity to discuss the case and cast his vote; otherwise the authority of the foreman is the same as any other juror.

Your initial conduct upon entering the jury room is a matter of importance. It is not wise to immediately insist upon a verdict because if your sense of pride is aroused, you may hesitate to change your position, even if you decide you are wrong. Consult with one another and consider each other's views. Deliberate with the objective of reaching an agreement, if you can do so without disturbing your individual judgment. Each of you must decide this case for yourself, but you should do so only after discussion and consideration of the case with your fellow jurors. Do not hesitate to change an opinion if you are convinced it is wrong; however, you should not surrender an honest conviction in order to be congenial or to reach a verdict solely because of the opinion of other jurors.

The Court will place in your possession the verdict forms that I have explained to you, the exhibits and a copy of these instructions. The foreman or forelady will retain possession of these forms and return them to the Court. Until a verdict is pronounced in open Court, you are not to disclose to anyone else the status of your deliberations or the nature of your vote.

When all twelve of you have agreed upon a verdict, complete the forms that correspond to that decision and all twelve of you jurors sign the verdict or verdicts in ink. You will notify the Court by knocking on the door of the jury room; and if at any time the jury has a question it shall be reduced to writing by the foreman or forelady and signal for the Bailiff and give it to him. He will relay it to the Court. The foreman or forelady will sign the paper on which the question is written.

I instruct you further that any question you have should not be related verbally to the Baliff. He has no authority to hear it. As far as any question is concerned, do not direct it to the Bailiff, as he as no authority to hear or entertain them.